In the Supreme Court of the United States

October Term, 1978

No. 78-1116

Shell Oil Company,
Petitioner,
v.
George Deukmejian, Attorney General of the State of California
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

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The judgment of the court below upholding the constitutionality of a California statute prohibiting price discrimination in the sale of motor vehicle fuels and oils correctly follows this Court's recent decision in *Exxon v. Maryland,* 437 U.S. 117 (1978), *reh. den. sub nom. Shell Oil Co. v. Maryland,* .... U.S. ...., 99 S.Ct. 232 (1978). Shell's petition is a thinly-veiled and pertinacious effort to relitigate this Court's *Exxon* decision. The arguments Shell now seeks to raise, furthermore, were never raised in the District Court and are based upon hypothetical situations that may

never come to pass and upon Shell's unfounded characterization of the California statute as a "price-fixing scheme".

STATEMENT OF THE CASE

A. The California Statute.

In 1975, the California Legislature adopted Chapter 8 of Division 8 of the Business and Professions Code, which prohibits price discrimination in the sale of "motor vehicle fuels and oils" (*e.g.*, gasoline) by petroleum companies where the discrimination lessens competition.[1] (Cal. Bus. & Prof. Code § 21200-3.)

Essentially, Chapter 8 prohibits major gasoline wholesalers (defined as a company whose gasoline refining capacity or wholesale sales volume is 50,000 barrels a day or more) from discriminating in the *wholesale* gasoline price charged where the effect of the discrimination is to lessen or injure competition (Cal. Bus. & Prof. Code § 21200).[2] The language used is virtually identical to section 2(a) of the Federal Robinson-Patman Act (15 U.S.C. § 13(a)), although that Act applies to interstate sales whereas Chapter 8 applies to wholesale gasoline sellers in California only.

1. Chapter 8 was introduced into the California Assembly on February 26, 1975 as AB 950, was reported out of the California Senate Committee on Business and Professions on August 26, 1975, *without opposition*, was promptly passed by the Legislature and signed into law by the Governor on September 22, 1975, to be effective on January 1, 1976. *See California Legislative Assembly Final History, 1975-76 Session* (1977) at 587.

2. The statute contains a legislative declaration that the distribution of motor gasoline in the State affects the general economy of the State, the public interest and the public welfare. The Legislature further declared that "[c]ompetition and freedom from unreasonable discriminatory practices are essential to the fair and efficient functioning of a free market economy." (Cal. Bus. & Prof. Code § 21203.)

The only material difference between the Robinson-Patman Act and Chapter 8 is contained in the so-called "meeting competition defense," a mechanism allowing justification for otherwise prohibited price discrimination. Section 2(b) of the Robinson-Patman Act if read literally allows a seller to justify discrimination by showing that his lower price was made in good faith to meet an equally low price of a competitor, the so-called "spot" pricing interpretation. In literal contrast, Chapter 8 allows a justification for price discrimination by showing that a seller's lower price was made in good faith to meet an equally low price of a competitor ". . . and was also offered to any other of his purchasers in competition with" the favored purchaser. (Cal. Bus. & Prof. Code § 21200.) Thus, under Chapter 8, a major gasoline supplier may only discriminate in pricing to meet competition in good faith, and then only on a competitive area basis.

B. The Proceedings Below.

Shell Oil Company, one of the ten or so companies in California whose gasoline marketing practices were the subject of the Legislature's concern and therefore subject to the Act, filed a complaint on December 17, 1975 attacking the constitutionality of the California statute. Although several grounds were raised in the complaint, the only ground on which Shell moved for summary judgment in the District Court was its claim that the California statute is preempted under the Supremacy Clause by the Robinson-Patman Act (15 U.S.C. § 13).[3]

3. Other challenges alleged in the complaint included Due Process and Contract Clause violations (R. 9-10); other challenges advanced in briefs by Shell and certain *amici curiae* include Equal Protection and Commerce Clause violations (R. 421, 513-4, 583, 629-30).

On June 11, 1976 the District Court held the California statute preempted by the Robinson-Patman Act, a decision which was reversed on appeal to the Ninth Circuit Court of Appeals after this Court's decision in *Exxon v. Maryland,* 437 U.S. 117 (1978), *reh. den. sub nom. Shell Oil Co. v. Maryland,* .... U.S. ...., 99 S.Ct. 232 (1978). *Shell Oil Co. v. Younger,* 587 F.2d 34 (9th Cir. 1978).

Shell did *not* argue in the District Court that the California statute is preempted by the Sherman Act (15 U.S.C. § 1, *et seq.*)[4] Shell waived all other challenges aside from preemption by the Robinson-Patman Act.[5] *See* Shell Cert. Pet. at (App.) 3a; R. 20, 30, 35, 39-76. On appeal to the Ninth Circuit Court of Appeals, Shell only argued preemption by the Robinson-Patman Act in its appellate brief. *For the first time in the three year pendency of its suit,* Shell argued in a supplemental brief after the Supreme Court's decision in *Exxon v. Maryland, supra,* that the Sherman Act preempts the California statute. The Ninth Circuit Court of Appeals rejected the contention and Shell now seeks certiorari primarily on this ground.

REASONS FOR DENYING THE WRIT

SHELL'S PETITION RAISES NO IMPORTANT LEGAL QUESTIONS

Just six months ago this Court in *Exxon v. Maryland,* 437 U.S. 117 (1978), *reh. den. sub nom. Shell Oil Co. v. Maryland,* .... U.S. ...., 99 S.Ct. 232 (1978), unanimously laid down the guiding principles that determine whether the Robinson-Patman Act or the general policy of the Sherman Act preempt a state price discrimination statute containing a more restrictive "meeting competition" defense than that contained in the Robinson-Patman Act. In establishing these principles, this Court refused to consider a variety of hypothetical situations raised by Shell and other oil companies. *Id.* at 130-1.

4. Indeed, the portion of Shell's complaint alleging a Supremacy Clause violation (Count I) merely refers to preemption by the Robinson-Patman Act, not the Sherman Act.

5. Shell apparently did this to convert into a final judgment, the (otherwise interlocutory) District Court's order granting summary judgment on the claim that the California statute is preempted by the Robinson-Patman Act.

Shell's petition seeks to relitigate *Exxon v. Maryland, supra,* and seeks to raise several hypothetical situations that may never actually come to pass. Futhermore, under the guise of "protecting" the interests of the California consumer, Shell improperly seeks to supplant the judgment of the California Legislature with Shell's grossly exaggerated claims (without support in the record) that the California statute is "anticompetitive", causes "price rigidity" and "nullifies competition", and with Shell's totally unfounded claims that the statute constitutes a "price-fixing scheme" and a "*de facto* customer allocation" scheme in violation of the Sherman Act. (Shell Pet. at 1, 8, 11, 17, 21.) In short, Shell's petition raises no important legal questions and therefore should be denied.

A. The Court of Appeals Correctly Rejected Shell's Claims That the California Price Discrimination Statute Is Preempted by the Robinson-Patman Act and the General Policy of the Sherman Act.

The Court of Appeals correctly rejected Shell's preemption claims under the principles stated in this Court's decision in *Exxon v. Maryland, supra,* 437 U.S. at 129-134. *See Shell Oil Co. v. Younger,* 487 F.2d 34 (9th Cir. 1978), reproduced at 6a-10a of Shell's petition.

Shell now contends that the *Exxon* decision left open the question whether the Robinson-Patman Act preempts the California statute as applied to a situation "where there is

price competition for sales to the *same purchaser*."[6] (Shell Pet. at 2, 20-21.) Even if the question were in fact left open by *Exxon*, the principles stated in *Exxon v. Maryland*, *supra*, compel rejection of the claim.

> ". . . [I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption, see, *e.g.*, *DeCanas v. Bica*, 424 U.S. 351, 357-8, n. 5; *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127, and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy of choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions." 437 U.S. at 132-3 (footnote omitted.)

6. The existence of price competition for sales to the same purchaser is purely hypothetical as to Shell's branded dealer sales since branded dealers are prevented from switching suppliers by contract, by the California non-adulteration and passing-off law (Cal. Bus. & Prof. Code §§ 20911, 20930), and by the "several thousand dollar" cost of changing signs (R. 333-5, 861 at Appendix II, ¶s 4-6, 913-959). *See also* the discussion of Shell's extensive control of its dealers in *Shell Oil Co. v. FTC*, 360 F.2d 470, 479-487 (5th Cir. 1966).

Shell's claims of price competition for sales to the same customer seem to be based on its sales to industrial or commercial customers who are "end users" rather than resellers of gasoline. Whether the California statute applies to such accounts is unclear since the Legislature may have addressed a problem involving retail service stations and the statute has yet to be construed by the California courts. Federal courts should abstain from deciding such constitutional claims. *See e.g.*, *Railroad Commission v. Pullman*, 312 U.S. 496 (1941); *Alabama Fed. of Labor v. McAdory*, 325 U.S. 450, 460-3, 470-1 (1945); *Reetz v. Bozanich*, 397 U.S. 82 (1970). Furthermore, Shell's claim that price competition for sales to commercial customers may be affected by the California statute is tenuous. The California statute is violated where a price discrimination between competing customers lessens competition between those customers. That a difference in gasoline prices to industrial customers, *e.g.*, lessens competition in the sale of the industrial product is dubious.

Furthermore, Shell's argument is based upon the premise that section 2(b) of the Robinson-Patman Act creates a "federal right to engage in discriminatory pricing", a premise that this Court specifically rejected in *Exxon v. Maryland*, *supra*, 437 U.S. at 131-2.

Thus the Court of Appeals correctly rejected Shell's preemption claims.

B. Shell Improperly Seeks to Raise Hypothetical Situations.

Shell's petition is based upon the hypothetical "ruinous choice" and "ripple effect" arguments (Shell Pet. at 8-11). Shell hypothesizes that a seller must either risk losing the business of a customer or keep the customer at the "ruinous" cost of a "widespread price reduction to many customers." (Shell Pet. at 10.) Shell's hypothesis that a ruinous, widespread price reduction to many customers is necessary is pure speculation.[7] Shell compounds its specu-

7. Since Shell, like other oil companies, have previously had a practice of meeting competition on a "trade area" basis, it is clear that Shell can meet competition under the California statute without a "ruinous" effect by extending the lower price to those customers competing with the customer to receive the favored price. Introduced as evidence in this case (under seal pursuant to a protective order) are several Shell "trade area" maps including that for the San Francisco market, which is divided into a number of trade areas containing those Shell customers who "normally compete with one another." *See* R. 861 (Document 42), at Appendix III. Shell's "trade area" practice is also documented in the affidavits of L.E. Yeager filed in May 1971 and April 1972 in *Bunty v. Shell Oil Co.*, 1972 Trade Cases ¶ 74,252 (D. Nev. 1972) [R. 298] and the letter of A.M. Minotti, counsel for Shell, dated August 13, 1970, contained in the Appendix to the Hearings on Marketing Practices in the Gasoline Industry, Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., pt. 1 (1970), at pp. 196-7 [R. 262, 298]. (*See also*, R. 260-3, 298, 326-330, 333-5, 340, 342-8, 351-62.)

lation by the hypothetical argument that the price reduction "could easily ripple into every corner of the state . . . ." (Shell Pet. at 9). This, too, is pure speculation.[8]

Shell's attempt to raise hypothetical situations is an improper attempt to "seek . . . out conflicts . . . where none clearly exists." *Exxon v. Maryland, supra,* 437 U.S. at 130 (citations omitted).

C. Shell May Not Argue Preemption by the Sherman Act in This Court as It Never Raised the Point in the District Court.

Shell's argument that the California statute is preempted by the general policy of the Sherman Act was not raised in the District Court. See page 4, *supra*. Therefore, Shell cannot now raise this point. *See Tyrrell v. District of Columbia,* 243 U.S. 1, 5-6 (1917).

D. The Court of Appeals Correctly Rejected Shell's Claim That the California Statute Is Preempted by the General Policy of the Sherman Act.

Shell's claim that the California statute is preempted by the general policy of the Sherman Act is based on its incorrect use of hypothetical situations (see pages 7-8, *supra*) and upon its incorrect assertion that the California statute is anticompetitive and constitutes a "price fixing scheme" and a "*de facto* customer allocation" scheme. The California statute is not anticompetitive[9] and in no way compels

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8. Shells "ripple" argument was rejected by this Court in *FTC v. Sun Oil Co.,* 371 U.S. 505, 526-8 (1963).

9. Although Shell introduced *no* evidence in the District Court to show the anticompetitive effect of the California statute, California presented evidence of the anticompetitive effect of the meeting of competition on a "spot" basis and the pro-competitive effect of the meeting of competition on a "competitive area" basis under

or authorizes Shell to combine or conspire with others to fix prices or to divide or allocate customers.[10] Thus, the California statute in no way compels or directs a Sherman Act violation. Indeed, Shell so recognizes and merely claims that the California statute conflicts with the "general policy" of the Sherman Act.

Even if the California statute were assumed to be anticompetitive, this Court's decision in *Exxon v. Maryland, supra,* establishes that the California statute is not preempted by the Sherman Act. The California statute is clearly no more anticompetitive than the Maryland statute which this Court upheld as not preempted by the general policy of the Sherman Act. The Maryland statute requires voluntary allowances to be granted uniformly throughout the whole state whereas the California statute merely requires the meeting of competition on a competitive area basis, which is considerably smaller than statewide. Thus

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the California statute (R. 861 at Appendix II at ¶s 8-15). Furthermore, the anticompetitive effect of the meeting of competition on a "spot" basis is recognized in *FTC v. Sun Oil Co. supra,* 371 U.S. at 523.

The California statute promotes true price competition by preventing Shell from "protect[ing], discriminatorily, sales to one customer at the expense of other customers." *FTC v. Sun Oil Co., supra,* 371 U.S. at 523. The statute gives Shell the "incentive to alter its overall pricing policy" by preventing Shell from meeting challenges to its pricing structure by "wholly . . . individualized responses." *Ibid.*

10. Shell's erroneous claim that the California statute constitutes a "*de facto* allocation of customers" is based on its hypothetical argument that the California statute puts Shell to the "ruinous choice" of losing a customer or making "widespread price reductions to many customers." *See* pages 7-8, *supra*. Furthermore, if Shell cannot afford to meet competition on a "competitive area" basis, it is a less efficient marketer than the competitor and should lose the business.

the California statute clearly is not preempted by the general policy of the Sherman Act.[11]

E. Shell's Attempt to Have This Court Determine the Limitations (if any) to Exxon v. Maryland Is an Improper Request for an Advisory Opinion on an Issue Not Raised in the Instant Case.

Shell's request that this Court adjudicate the limitations (if any) on *Exxon v. Maryland, supra,* and adopt *Parker v. Brown* as a limitation on *Exxon*, is an improper attempt to have this Court render an advisory opinion. Whether the principles established in *Exxon v. Maryland, supra,* apply to state statutes, outside the context of the Robinson-Patman Act, that are shown to have drastic anticompetitive effects or that require conduct that is tantamount to a Sherman Act violation, may or may not be an interesting legal issue suitable for a law review article.[12] And whether the *Parker* doctrine should be adopted as an appropriate limitation to *Exxon v. Maryland, supra,* may or may not present a grand legal question involving the complex interfacing of preemption law and the *Parker* doctrine. This Court may well in the future be presented with a case raising these legal issues; or the matter may never have to be decided.

In the instant case, however, the California statute has the same basic purpose as the federal Robinson-Patman

11. Shell's reliance on Justice Powell's remarks in *United States v. United States Gypsum Co.*, ... U.S. ...., 98 S.Ct. 2864, 2890 (1978) (concurring opn.) is misplaced as the California statute clearly does not require the seller either to lose a customer or reduce prices to *all* buyers. Furthermore, Justice Powell's remarks do not concern preemption of state price discrimination statutes.

12. The state's ability to compel conduct that *violates* the Sherman Act (where the *Parker v. Brown* requirements are met) implies an ability to enact a statute that either falls short of compelling a Sherman Act violation or has an anticompetitive effect.

Act (*cf. Exxon v. Maryland, supra,* 437 U.S. at 132-3). The California statute clearly does not require a violation of the Sherman Act or conduct that is tantamount to a Sherman Act violation. All of Shell's claims of the anticompetitive effect of the California statute are hypothetical, not founded in the record. *See* pages 7-8 and footnotes 6-9, *supra*. The record in this case was developed solely to determine Shell's claim of preemption by the Robinson-Patman Act, not the newly raised claim of preemption by the Sherman Act. *See* page 4 and Part C, *supra*. Thus this is not the proper case to adjudicate the limitations, if any, on *Exxon v. Maryland, supra.*

Furthermore, Shell's claim that the Court of Appeals should have applied the *Parker v. Brown* doctrine is incorrect as that doctrine is applied only when the State directs conduct that *violates* the Sherman Act. Moreover, *Parker v. Brown*, 317 U.S. 341 (1943), even if applicable, does not invalidate the California statute as it clearly constitutes a state legislative mandate. Shell's claim that "ongoing regulatory supervision" is required under *New Motor Vehicle Board v. Orrin W. Fox Co.*, ... U.S. ......, 98 S.Ct. 403, 412 (1978), is clearly without merit. The California statute is enforced by the State's Attorney General under California Civil Code sections 3369-3370 (and Shell's complaint at ¶ 4 so alleges). There is no reason to require an elaborate bureaucracy be set up for the "state action" doctrine to apply. *New Motor Vehicle Board, supra,* merely requires that a state statute declare a "clearly articulated and affirmatively expressed . . . design . . . to displace unfettered business freedom . . ." for the "state action" exemption to apply. 98 S.Ct. at 412. The California statute clearly does so. Shell takes the reference to "ongoing regulatory supervision" out of its context, which is in a discussion of

whether the state statute loses the "state action" exemption because it accorded private parties (existing dealers) a role in the regulatory process, a problem which is not posed in this case.

Thus, Shell's claim of preemption by the Sherman Act does not warrant certiorari in this case.

F. The Court of Appeals Correctly Rejected Shell's Argument Based on the California Supreme Court's Decision in Rice.

The Court of Appeals correctly rejected Shell's reliance on the California Supreme Court's decision in *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). *Rice* involved a state-required resale price maintenance scheme under which the liquor manufacturers fixed the minimum price at which retailers could sell liquor. *Rice* invalidated a California statute that *required a violation* of the Sherman Act (resale price maintenance). The California petroleum price discrimination statute does not compel or authorize resale price maintenance or price fixing in violation of the Sherman Act.[13] Thus, even assuming, *arguendo,* that the *Rice* decision could supplant this Court's decision in *Exxon v. Maryland, supra,* the Court of Appeals correctly rejected Shell's argument based on *Rice.*

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13. Indeed the California price discrimination statute only regulates the unilateral conduct of Shell and other oil companies. In no way does it compel or authorize Shell to fix prices or divide markets with its dealers, distributors or competitors.

CONCLUSION

For the reasons stated above, respondent George Deukmejian, Attorney General of the State of California, respectfully submits that Shell's petition for certiorari should be denied because it raises no important legal question, the Court of Appeals having correctly rejected Shell's arguments following the principles laid down by this Court last Term in *Exxon v. Maryland, supra.*

Respectfully submitted,

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